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Supreme Court U.S.
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No. 02-437

In the

Supreme Court of the United States

MARIE N. JACKSON,

Petitioner,

v.

CHUBB CORPORATION; CHUBB & SON, INC.; FEDERAL INSURANCE COMPANY; PAT HURLEY; MICHAEL MARINARO; GEORGE FAY; DORIS JOHNSON; MALCOLM BURTON; JEFF KING; KIM HOGREFE; BRIAN KIRSTIANSEN; SUSAN GAFFNEY; ED ELLIS; JIM GARDNER; JOHN DEGNAN; ED SPELL; SYLVESTER GREEN; RON GOLDSTEIN; AARON GOLDSTEIN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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QUESTIONS PRESENTED

Whether the courts below misapplied applicable legal authorities to Marie Jackson's ("Jackson's") New Jersey Law Against Discrimination claims ("NJLAD") by concluding that she was not entitled to prove her NJLAD claims under a "continuing violation" theory, and applying a two year, rather than a six year statute of limitations to her NJLAD claims.

Whether by granting summary judgment to the defendants under the McDonnell Douglas/Burdine test against this Court and Third Circuit precedent, where pretext evidence had been introduced and there were material facts in dispute, the courts below misapplied this Court's ruling in Reeves.

Whether a per se violation of the discrimination laws may be established by an employer's failure to investigate claims of discrimination and take remedial action.

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INTRODUCTION

This is the rare case where this Court should exercise its discretion under Rule 10 to correct an injustice and grant certiorari where there has been grossly erroneous factual findings and misapplication of New Jersey state law by the District Court.

The courts below improperly applied a two-year statute of limitations to plaintiff's claims and also granted summary judgment despite numerous genuine issues of material fact. Ms. Jackson is the victim of invidious discrimination based upon eight years of differential, disparaging treatment in which she was continuously passed over for promotions given to less qualified, younger employees and was ultimately terminated merely because she is a person of color (African American), a woman, and over forty years of age. Her termination followed soon after she dared to complain about discrimination in a corporation whose managers and officers were primarily Caucasian males. Defendants' response to Ms. Jackson's discrimination claims was to turn their back and effectively ignore her charge; incredibly, no meaningful investigation was ever performed, and no witness with relevant knowledge of her charges was ever interviewed by the company.

I. THE DISTRICT COURT MISCONSTRUED THE APPLICABLE STATUTE OF LIMITATIONS AND PLAINTIFF'S CLAIMS SHOULD BE REINSTATED UNDER ALI.

Ms. Jackson was fired on June 20, 1997. She filed her initial complaint on September 15, 1998. Under *Rush v. Scott Specialty Gases, Inc.*, 113 F.3d 476 (3d Cir. 1997), plaintiff may properly recover under a continuing violation theory. Therefore, plaintiff may recover for NJLAD claims dating back 6 years under *Montells v. Haynes*, 133 N.J. 282, 627 A.2d 654 (1993) and *Ali v. Rutgers*, 166 N.J. 280, 765 A.2d 714 (2000) where operative facts arose before July 27, 1993 as herein. Moreover, recent case law has held that the statute of limitations should begin to run on the last day of

employment. *Alderiso v. Medical Center of Ocean County*, 167 N.J. 191, 770 A.2d 275 (2001). Therefore, as operative facts arose prior to the *Montells* decision, the District Court should have applied a six-year statute of limitations and in fact plaintiff's claims dating back to June 20, 1991 would be timely under both *Montells* and the continuing violation theory.

New Jersey's Appellate Division reaffirmed the application of the continuation violation theory as an equitable exception to the statute of limitations. *Shephard v. Hunterdon Developmental Center*, 336 N.J. Super. 395, 765 A.2d 217 (App. Div. 2001), *reversed in part, affirmed in part, remanded*, 2002 WL 1801184 (N.J.), __ N.J. __, __ A.2d __ (2002). The Shepard Court stated that continuing violation theory is an equitable exception permitting plaintiff to use the final act as the commencement of the statute limitations. In other words, when an individual is subject to continual and cumulative pattern of conduct such as Jackson, the statute does not begin to run until the wrongful action ceases. *See also Cardenas v. Massey*, 269 F.3d 251 (3d Cir. 2001).

The pattern of discrimination against Jackson was unlike the discrete acts deemed inapplicable under the continuous discrimination theory in *Hall v. St. Joseph's Hospital*, 343 N.J. Super. 88, 749 A.2d 1002 (App. Div. 2001), *cert. denied*, 171 N.J. 336 (2002); *Bolinger v. Bell Atlantic*, 330 N.J. Super. 300, 749 A.2d 857 (App. Div. 2000), *cert. denied*, 165 N.J. 491, 758 A.2d 650 (2000).

Herein, the continual pattern of discrimination culminated in plaintiff's termination and is starkly similar to the facts in *Ali*. However, the operative facts giving rise to her claims arose before to July 27, 1993 and therefore under *Montells*, she is entitled to utilize a six-year statute of limitations dating back from June 20, 1997.

II. THE DISTRICT COURT'S ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANTS UNDER THE MCDONNELL DOUGLAS/BURDINE TEST IS AGAINST THIS COURT'S PRECEDENT, WHERE SUBSTANTIAL PRETEXT EVIDENCE HAD BEEN INTRODUCED AND THERE WERE MATERIAL FACTS IN DISPUTE AND SHOULD BE REVERSED.

1. Defendants' Inconsistent Statements Demonstrate That Their Articulated Reasons Are Unworthy Of Credence And Precluded Summary Judgment Under Reeves[1].

The District Court granted summary judgment in direct contravention of established authorities, holding that summary judgment is inappropriate, where, as here, the trier of fact could determine that a defendant's articulated nondiscriminatory reasons for actions against an employee could be a pretext for discrimination or retaliation.[2]

Defendants' witnesses testified that Jackson was not qualified for promotion because she was not performing in her current position as D&O Examiner, either because her performance was allegedly deficient or her caseload was neither unreasonable nor allocated to her to set her up for failure. However, against this testimony, the defendants' own documents and other witnesses contradict these assertions, and show material issues of fact in dispute.

Defendants' own documents demonstrate Jackson managed more cases than usually assigned to claims examiners, even when the caseloads for all examiners were increased. She consistently handled a heavier and more complex caseload than similarly situated Caucasian, younger examiners.

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[1] *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

[2] *Wilson v. Parisi*, 268 N.J. Super. 213, 633 A.2d 113 (App. Div. 1993); *Woods-Pirozzi v. Nabisco Foods*, 290 N.J. Super. 252, 675 A.2d 684 (App. Div. 1996); *Kelly v. Bally's Grand, Inc.*, 285 N.J. Super. 422, 677 A.2d 355 (App. Div. 1995).

The defendants' own interoffice communications show that despite the layoffs of other claims examiners, Jackson achieved excellent settlement outcomes and reduced the New York field office's caseload. Defendants have only shown that Jackson's performance qualifications are disputed by both parties and therefore should be submitted to the jury.

Defendants submitted further conflicting evidence on whether she performed her job, and was subject to differential treatment as to settlement authority and promotions. Jackson was recommended for higher reserve authority by her supervisor to allow her to be more proactive on her files. That request was discriminatorily denied by the CEO (alleged for poor performance), which adversely impacted upon her effectiveness from 1994 through 1997 and further tainted other supervisors' perception about her performance. These inconsistent statements raise an issue of material fact that can only be resolved by a jury.

Defendants' testimony regarding Jackson's role in her department is also conflicting. Mr. Ellis stated in his deposition that Jackson had a keen mind and handled the most complex of cases, and supervised the examiners who were promoted over her. Yet Kristiansen and Petillo stated that all cases were equal and Jackson did not supervise anyone. Defendants seem confused as to Jackson's role, and at minimum this is a material disputed fact for resolution by a jury.

Defendants contended that Jackson was solely responsible for not meeting deadlines, yet at the same time, admitted that the unit secretary responsible for Jackson's secretarial support, was terminated for manipulating data. This lack of secretarial support impacted upon Jackson's ability to perform her job.

The defendants also contend that Jackson completed assignments late, but the evidence demonstrates that any delay was attributable to Chubb's loss of some of her files. In several of the cases upon which Jackson received criticism, the actual physical files were lost in transit, forcing

Jackson to recreate those files. Rather than admitting these circumstances caused delays in Jackson's work product, the defendants took advantage of a problem, and sought to unjustifiably paint Jackson as a non-performer.

2. Rebuttal Evidence Demonstrating Defendants' Proffered Business Reasons For Denying Jackson The Position Of Corporate Liability Examiner Demonstrated Pretext And Precluded Summary Judgment.

There is substantial pretext evidence to rebut defendants' conflicting testimony in articulating why Jackson was not promoted to the position of Corporate Liability Examiner in favor of Elliott. Elliott was hired for the position because of her "bad faith litigation" background. However, Elliott testified that she lacked hands-on experience in this area, with only a limited role in testifying in bad faith cases brought by Chubb insureds

Spell also stated he hired Elliott without opening the position to others, as she was second on the list after Stollsteimer originally accepted the position. Elliott never knew that she was the next best candidate in 1995. In 1996, without any job posting or notice to other employees that the position was once again open, Bob Bragg informed her that Spell would contact her directly about filling the position

3. Subjective Decision-Making Was Applied To Jackson, Thereby Precluding Summary Judgment.

A Court may not dismiss an action on summary judgment where defendants failed to use objective decision-making in deciding upon promotions, performance ratings and termination decisions. *Goosby v. Johnson & Johnson Medical, Inc.*, 228 F.3d 313 (3d Cir. 2000). Testimony by Chubb's upper management demonstrated that there were no written guidelines for Chubb supervisors or managers to follow for making objective decisions whether to promote, evaluate or terminate employees. Further, promotional opportunities were not posted; employees obtained positions within the company based upon word of mouth, or when a

supervisor, based upon subjective decisions about an employee, approached an employee to fill a job. Thus, *Goosby* is directly on point, and summary judgment should have been denied because Chubb's criteria for denying Jackson employment opportunities, rating her performance and terminating her were subjective.

Doris Johnson, a member of upper management, including HR functions, testified as the absence of such standards. Moreover, as to the position of Senior Zone Examiner, Johnson testified no written criteria for such promotions exist. One did not need a college degree, a law degree or even requisite experience to be promoted. The lack of such standards, including the fact that employees were hired by word of mouth, or at the whim of supervisors who would privately solicit employees whom fit their own criteria for a position, paved the way for discriminatory decision-making and validation of the Chubb "old boys network."

4. Evidence Of Differential Treatment Of Jackson Demonstrated Pretext And Precluded Summary Judgment.

Lesser-qualified individuals, as compared to Jackson, were promoted and otherwise recognized for their work. These individuals were similarly situated and younger than Jackson, with demonstrated performance issues. Rather than criticize or otherwise terminate these employees, however, Chubb demonstrated its discriminatory practices by promoting them. This differential treatment of other similarly situated demonstrates Chubb's articulated reasons are pretextual, thus precluding summary judgment.

Petillo, a claims examiner, received extremely favorable performance reviews, even though her manager, Gaffney, noted that she had not completed a D&O memo according to company guidelines. Further, Sharkey, a Caucasian male, achieved an overall rating of "Met All" in his February 1996 performance review even though his supervisor noted that he did not prepare his coverage letters and D&O memos according to company guidelines.

Surprisingly, although he received two "Met All" ratings out of five overall categories, he still received a final rating of "Exceeds Some." During the review period, he also failed to analyze and document a serious exposure position regarding the Genesco file. The company forgave this transgression by not addressing it in his performance review. While Chubb essentially discounted or forgave certain errors committed by Petillo, Sharkey and others (none of whom were African-American), Chubb treated Jackson differently.

Jackson was denied opportunities to apply for the position of Corporate Liability Examiner, House Counsel, and other position, being unaware of job vacancies until they had already been filled and made known only by word of mouth. Because of the defendants' discriminatory actions, Jackson was excluded from this old boys network where primarily Caucasian managers shared information between them and filled such positions based upon, "word of mouth." Jackson therefore could neither formally nor informally apply for these positions. As this Court and the Court of Appeals case law states, an individual need only be discouraged from applying for a position, and need not actually apply.[3] Each time the position was filled prior to Jackson's knowledge of such opening, the person promoted was Caucasian.

5. **Jackson Was Qualified For The Position Of Corporate Liability Examiner And Was Denied Such Position In Favor Of A Less Qualified, Caucasian Female.**

The parties materially dispute whether Jackson was qualified for the position of Corporate Liability Examiner and was denied such position in favor of Elliott, a younger,

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[3] *See Equal Opportunity Commission v. Metal Service Company*, 892 F.2d 341 (3d Cir. 1990); International *Brotherhood of Teamsters v. United States, et al.*, 431 U.S. 324 (1977); *See also Teamsters*, 431 U.S. at 365; *National Association for the Advancement of Colored People v. Town of East Haven*, 998 F.Supp. 176 (D. Conn. 1998); *Payne v. Travenol Labs*, 673 F.2d 798, 826-27 (5th Cir. 1982), *cert. denied*, 459 U.S. 1038 (1982); *Lams v. General Waterworks Corp.*, 766 F.2d 386, 389, 391-92 (8th Cir. 1995).

Caucasian employee. Thus, there are material facts in dispute on this issue alone and Jackson's discrimination claims must be submitted to the jury.

Jackson surpassed Elliott's qualifications, by reason of several years of litigation experience with a large New Jersey firm, meeting all performance targets and/or objectives for each performance year from 1989 to 1996, and achieved the designation award of Senior Claims Officer for outstanding performance in 1993. During that time, Jackson successfully managed numerous cases for Chubb's insureds; including litigation against Chubb itself, not limited to "bad faith litigation". Jackson even gave seminars on the subject. Elliott was merely peripherally "involved" in bad faith matters and lacked Jackson's extensive experience in complex and class action and securities litigation Jackson received correspondence acknowledging her invaluable assistance in resolving Chubb claims These accomplishments were not recognized in her performance ratings and she was never promoted, unlike persons similarly situated to her.

6. Evidence Of Discrimination Against Other African-Americans And Others Based On Nationality, Age And Sex, Demonstrates Pretext And Precluded Summary Judgment.

Pretext is also demonstrated by evidence showing that defendants more likely than not discriminated against Jackson based upon rampant discrimination by King, and others, where King, in particular, engaged in a repeated pattern of marginalizing and denying promotional opportunities to African-Americans and persons who were older, made racial jokes and failed to remedy, and in fact, blamed the victim of, a racial slur. King uttered racial jokes in the early 1990's when he had supervisory authority over Jackson. As Kristiansen testified in his deposition, he heard King make the following joke: "What is a renege? A shift change at the post office." Kristiansen also heard King mimic Asian accents when making racial jokes about Asians going to the dentist, referring to "two thirty" as "tooth hurty."

Other African-American professionals also testified to King's racial animus toward them in the 1990's. Akin, an attorney working for King from 1992-1994, complained to the company that a young white male subordinate called her a "Fucking Black Bitch" and an African-American secretary was also upset by this conduct. King admonished her for provoking the racial slur due to her alleged failure to properly manage this particular white male.

According to Akin, King instructed her to downplay this racial incident and intentionally omit any reference to the term "Black" when reporting it in writing. Covington and McNicol, both African-American males, also were subject to discrimination by defendants King and Chubb. King found fault with their performance where none existed, recommended no bonuses, submitted reviews suggesting allegedly inferior performance, and caused Covington to resign rather than endure more racial discrimination from King.

King also testified that he was named as a party in other discrimination lawsuits that charged him with age and national original discrimination. Specifically, King was sued for age discrimination in the mid-1990's by Ashton, in the matter of *Ashton v. Chubb & Sons, Inc.*, and for national origin discrimination by Adamchek, in the matter of *Adamchek v. Chubb & Sons, Inc.*

Based upon the foregoing, the evidence shows that Jackson was subject to differential treatment and other discrimination of African-American professionals who had the same supervisors, either directly or indirectly, suffered discriminatory animus within the workplace. The jury, as fact finder, can infer that performance ratings and promotional opportunities at Chubb were not decided on merit but on race, age and/or gender. Chubb shamelessly used subjective performance evaluations as weapons to destroy a career if one was a person of color, or over the age of 40, or female, and the company perceived the individual as not like one of them.

7. The Defendants' Ineffective Investigation Into Jackson's Claims Of Discrimination Is Evidence Of Pretext, Thereby Precluding Summary Judgment.

The defendants' failure to investigate these claims is evidence of an ineffective anti-discrimination policy further demonstrating pretext. Jackson's claims of discrimination, which she communicated in 1995, 1996 and 1997, were never investigated by Hurley; a per se violation of the NJLAD, Title VII and the New York Human Rights Law. In fact, Chubb spent more time documenting reasons to criticize Jackson's performance and terminate her, than in conducting a truly impartial and thorough investigation as required by the LAD. *See Lehmann v. Toys 'R' Us, Inc.*, 132 N.J. 587, 626 A.2d 445 (1993).

The failure of such investigation constitutes a per se violation of Jackson's right to a discriminatory-free work environment which in itself precludes summary judgment. Based upon the foregoing, summary judgment should not have been granted, because established case law prohibits summary judgment where there is evidence of inconsistent statements, refuted evidence, differential treatment, subjective decision making, other discriminatory conduct and a failed discrimination policy, such as what exists here.

CONCLUSION

For the foregoing reasons and those set forth in the initial petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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